IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs April 23, 2008

TPI CORPORATION, ET AL. v. JAMES (JASON) D. WILSON

Appeal from the Circuit Court for Washington County
No. 23689 Jean A. Stanley, Judge

No. E2007-02315-COA-R3-CV - FILED AUGUST 15, 2008

In July 2004, TPI Corporation, Robert E. Henry, Sr., and Robert E. Henry, Jr. ("the Plaintiffs") filed a complaint against James (Jason) D. Wilson ("the Defendant") seeking a temporary restraining order ("TRO") as well as compensatory and punitive damages. The Defendant eventually agreed to the entry of a permanent restraining order and, with that agreement, the Plaintiffs nonsuited their remaining claims for monetary damages. The trial court entered a final judgment incorporating the parties' agreement on September 29, 2005. Almost two years later, the Defendant, pro se, filed a "Motion to Dismiss Plaintiff's [sic] Voluntary Non-Suit With Prejudice" and a separate motion requesting sanctions pursuant to Tenn. R. Civ. P. 11. The trial court denied the motions because they were untimely, having been filed almost two years after entry of the final judgment. The Defendant appeals, claiming the trial court erred when it denied his motions. The Plaintiffs claim that this appeal is frivolous. We affirm the judgment of the trial court and conclude that the Defendant's appeal is, indeed, frivolous. We remand this case to the trial court with instructions.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed; Case Remanded

CHARLES D. SUSANO, JR., delivered the opinion of the court, in which D. MICHAEL SWINEY and SHARON G. LEE, JJ., joined.

James (Jason) D. Wilson, Whiteville, Tennessee, appellant, pro se.

Thomas C. Jessee, Johnson City, Tennessee, for the appellees TPI Corporation, Robert E. Henry, Sr., and Robert E. Henry, Jr.

OPINION

I.

This litigation began in July 2004. The Plaintiffs alleged in their complaint, in part, as follows:[1]

> That on or about the 15th day of July, 2004 the defendant, James (Jason) D. Wilson, made telephone calls to the secretary of Robert D. Van de Vuurst, attorney for the plaintiff corporation, threatening to harm Van de Vuurst and others.
>
> On or about July 15, 2004 the defendant also called the plaintiff, Robert Henry, Jr., confirming his threats to Van de Vuurst and additionally threatening to cause bodily harm and economic damage to Robert Henry, Sr., Robert Henry, Jr., and employees and agents of TPI Corporation.
>
> The plaintiffs are informed and believe that the defendant is attempting to gain ownership of stock of TPI Corporation, the value of which is negligible compared to the overall value of the company for the purpose of interfering with the company's called special meeting scheduled for August 2, 2004 and for the purpose of entering the premises of TPI possibly to carry out his threats.
>
> The plaintiffs are informed and believe that the defendant, James (Jason) D. Wilson, is a multiple convicted felon and is currently on parole from the State of Florida.
>
> The plaintiffs are informed and believe that the defendant, James (Jason) D. Wilson, has threatened to acquire stock in the TPI Corporation in a manner that would cause financial damages to the corporation.
>
> The defendant's actions in making threats of violence and economic damage constitute outrageous conduct as defined by the highest courts in the State of Tennessee. The actions of the defendant further constitute an intentional infliction of emotional distress on the plaintiffs causing them to suffer mental distress for which they are entitled to recover compensatory and punitive damages.

[1] The original paragraph numbering has been omitted from this quotation and all other pleadings quoted in this opinion.

> Because of the outrageous acts of the defendant, the plaintiffs have incurred damages in the form of the cost of security and protective measures to prevent the defendant from coming on to the property of the plaintiffs and their agents and employees.
>
> The plaintiffs aver that the acts of the defendant are intentional and/or so grossly negligent as to entitle the plaintiffs to recover punitive damages.
>
> The plaintiffs are informed and believe they are entitled to a restraining order, both temporary and permanent, to prevent the defendant from coming about the plaintiffs, their families, employees and agents. The plaintiffs will suffer irreparable harm if the defendant carries out the threats of violence and intimidation.

Based on the verified complaint, the trial court immediately issued a TRO prohibiting the Defendant from coming about the premises of TPI Corporation or any facility at which TPI Corporation was doing business. The trial court also restrained the Defendant from coming about Robert E. Henry, Sr., and Robert E. Henry, Jr. The notice to the Defendant indicated that a hearing would be held on August 3, 2004, at which time the trial court would consider the Plaintiffs' request that the TRO be converted into a temporary injunction. At the August 3 hearing, the court was informed that the Defendant had not been served with the TRO. As a result, the court issued a new TRO and set a hearing for August 26. At the August 26 hearing, the parties announced they had agreed that the TRO would remain in effect pending further action by the court. An order was entered reflecting the parties' agreement. The order states that all parties were represented by counsel at the August 26 hearing.

In September 2004, the Defendant filed a pro se motion for sanctions claiming the complaint was frivolous. He stated that the Plaintiffs and their attorney had violated Tenn. R. Civ. P. 11.[2]

The trial was originally set for May 25, 2005. A few weeks before the scheduled hearing date, the Defendant filed a motion for continuance stating the he was "incarcerated and unable to attend the hearing as scheduled … [and the] underlying restraining order remains in effect and will so remain until the trial on the merits of this cause." Over the objection of the Plaintiffs, the trial court granted the motion.

The case was reset to September 20, 2005. No trial took place on that date, however, because the parties, through their attorneys, announced to the court that they had agreed that a permanent injunction would issue. The Plaintiffs also announced their intention to nonsuit their claims for monetary damages. The order entered by the trial court incorporating the parties' agreement provides as follows:

---

[2] The record is silent as to why the Defendant filed a pro se motion when he was still represented by counsel.

> This matter was set for trial on September 20, 2005. Counsel for the parties advised that the defendant, James (Jason) D. Wilson, is currently incarcerated and has no objection to a permanent injunction being entered in this matter. The parties agree that the plaintiff[s] may take a non-suit as to all claims for damages and either refile this matter at a later date or proceed with this claim in other litigation pending between the parties.

The trial court then ordered that the Defendant was permanently restrained from coming about any of the Plaintiffs or any facility where TPI Corporation was conducting business. The Plaintiffs were granted a voluntary nonsuit as to their claims for monetary damages. This order was entered by the trial court on September 29, 2005.

Almost two years later, in June 2007, the Defendant, proceeding pro se, filed a "Motion to Dismiss Plaintiff's [sic] Voluntary Non-Suit With Prejudice."[3] In the motion, the Defendant asserted that because the Plaintiffs only had one year in which to refile their claims for monetary damages, and because that one-year period had lapsed, the Defendant was entitled to an order dismissing with prejudice the Plaintiffs' claims for monetary damages. The Defendant later amended the motion to seek an award of attorney fees and costs.[4]

In July 2007, the Defendant filed a motion for sanctions pursuant to Tenn. R. Civ. P. 11 claiming, among other things, that the entire lawsuit was frivolous. The Defendant claimed that, in addition to lacking merit, the lawsuit violated Rule 11 because it was brought for an improper purpose, *i.e.*, for the purpose of maliciously harassing the Defendant and depriving him of his civil rights.[5]

The Plaintiffs responded to the Defendant's motions by pointing out that there were no claims in their lawsuit currently pending against the Defendant. According to the Plaintiffs:

> The defendant has misinterpreted the Tennessee Rules of Civil Procedure when he is asking for a dismissal since no claims are currently pending in the above referenced matter, a non-suit having been taken as to the damage claims only. The restraining order was made permanent and no appeal was taken from the same.
>
> Upon information and belief, the parties have settled all of their damage complaints in other litigation.

---

[3] The Defendant's attorney withdrew from the case following the entry of the order on September 29, 2005. The Defendant has proceeded pro se since entry of that order.

[4] Since the Defendant was once again proceeding pro se, we can only assume that he was seeking payment of attorney fees incurred through the entry of the order on September 29, 2005.

[5] The Defendant claimed that the malicious harassment was predicated on his Native American Indian ancestry.

> The motion for sanctions is a rambling illogical pleading in which Wilson requests sanctions against counsel for the plaintiffs even though the defendant's attorney approved the permanent restraining order. There is no sanctionable activity on the part of counsel.
>
> All of the recent pleadings filed by the defendant pro se fail to state any type of action that would entitle the defendant to any type of relief and therefore the same should be dismissed with the costs being taxed to the defendant and specifically the Order should provide that the defendant not be allowed to file any other pleadings in this matter.

In September 2007, the trial court entered an order denying the Defendant's pending motions. According to the trial court:

> The Court entered a Final Order in this case on September 29, 2005, incorporating the agreement of the parties that the plaintiff[s] be granted a voluntary non-suit as to all claims for monetary damages and that a permanent restraining order issue against the defendant. Costs were taxed to the defendant.
>
> Since June 26, 2007, the defendant has filed a Motion to Dismiss Plaintiffs' Voluntary Non-Suit with Prejudice, and Amended Motion to Dismiss and Award Costs and Attorney Fees, and a Motion for Sanctions. The September 29, 2005 Order is final. Defendant's Motions are without merit and are denied. Costs are taxed primarily and secondarily to the defendant.

II.

The Defendant appeals, raising numerous issues. Several of the issues have no bearing on this lawsuit whatsoever, such as a claim that the Plaintiffs defamed the Defendant by statements made to a local newspaper, the Johnson City Press. Other claimed "issues" are not issues, but are simply conclusory statements. There are only three real "issues" asserted by the Defendant that have any bearing on the present lawsuit. These issues are as follows: (1) the trial court erred when it granted a TRO without a hearing, resulting in a denial of due process; (2) the trial court erred when it failed to rule on the Defendant's first motion for Rule 11 sanctions; and (3) the trial court erred when it denied the Defendant's second motion for Rule 11 sanctions.

The Plaintiffs assert on appeal that the trial court's rulings were proper in all respects. The Plaintiffs further claim that the Defendant's appeal is frivolous and that they should be awarded costs, expenses, and attorney fees incurred in defending this appeal.

III.

A review of findings of fact by a court at a bench trial is de novo upon the record of the proceedings before the court, said record being accompanied by a presumption of correctness, unless the preponderance of the evidence is otherwise. Tenn. R. App. P. 13(d); ***Brooks v. Brooks***, 992 S.W.2d 403, 404 (Tenn. 1999). Review of questions of law is de novo, with no presumption of correctness. *See* ***Nelson v. Wal-Mart Stores, Inc.***, 8 S.W.3d 625, 628 (Tenn. 1999).

IV.

We first will address whether the Defendant was denied due process when the trial court issued a TRO. In relevant part, Tenn. R. Civ. P. 65.03 provides:

> **Rule 65.03. Restraining Order**. (1) When Authorized. A restraining order may be granted at the commencement of the action or during the pendency thereof without notice, if it is clearly shown by verified complaint or affidavit that the applicant's rights are being or will be violated by the adverse party and the applicant will suffer immediate and irreparable injury, loss or damage before notice can be served and a hearing had thereon.
>
> * * *
>
> (5) Binding Effect and Duration. A restraining order becomes effective and binding on the party to be restrained at the time of service or when the party is informed of the order, whichever is earlier. Every temporary restraining order granted without notice shall expire by its terms within such time after entry, not to exceed fifteen days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period, or unless the party against whom the order is directed consents that it may be extended for a longer period. The reasons for the extension shall be entered of record.

The trial court in the present case complied with the requirements of Tenn. R. Civ. P. 65.03. The verified complaint complies with the requirements of Rule 65.03(1), and the duration of the TRO was consistent with the time limits set forth in Rule 65.03(5). The Defendant's due process rights were adequately protected by the requirement in Rule 65.03(5) that a hearing be conducted within 15 days or the TRO would expire by its own terms. A timely hearing was scheduled in the present case but was continued because the Defendant had not been served. Once the Defendant was properly served, a hearing was scheduled for August 26, 2004, which was within the time frame specified in Rule 65.03(5). At this hearing, the Defendant agreed that the TRO would remain in effect until further order of the court. We conclude that the entry of the original TRO, which was in compliance with Rule 65, did not violate the Defendant's due process rights. To the extent that the Defendant is complaining about the continuation of the TRO following the hearing on August 26, 2004, he expressly agreed that the terms of the TRO would remain in effect and, therefore, he has waived any right to challenge the continuation of that order.

The next two issues surround the Defendant's claim that the trial court erred when it denied his two motions for sanctions filed pursuant to Tenn. R. Civ. P. 11. Although the trial court's final order entered on September 29, 2005, did not mention the first motion for Rule 11 sanctions, we conclude that the final order was an implicit denial of that motion. Because the Defendant did not appeal the final order, his claim is barred. Having said that, even if the Defendant's challenge to the denial of his first motion for Rule 11 sanctions could be considered timely, it is, nevertheless, devoid of any merit. Rule 11.03(1)(a) sets forth the applicable procedure for making a motion for sanctions. This Rule provides:

> (1) How Initiated.
>
> (a) By Motion. A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision 11.02. It shall be served as provided in Rule 5, but shall not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected. If warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion. Absent exceptional circumstances, a law firm shall be held jointly responsible for violations committed by its partners, associates, and employees.

There is nothing in the record to suggest that the Defendant complied with the safe harbor provisions of Rule 11.03(1)(a) prior to filing the first motion for sanctions. In fact, the Defendant's motion indicates that it was sent to the trial court and counsel for the Plaintiffs on the same day. In ***Mitrano v. Houser***, 240 S.W.3d 854 (Tenn. Ct. App. 2007), this Court reversed an award of Rule 11 sanctions because the safe harbor provisions were not complied with. In so holding, we emphasized that the procedural requirements of Rule 11 were mandatory. We stated:

> The procedures set forth in Rule 11.03 are clearly and unambiguously written, and are couched in mandatory terms. The rule provides, among other things, that "[a] motion for sanctions under this rule *shall* be made separately from other motions or requests," and "*shall* be served as provided in Rule 5" (emphasis added). Attorneys and litigants should be able to place their expectation and reliance upon the fact that Rule 11 means what it says, and that a party will not be sanctioned unless his or her opponent has followed the procedure for requesting sanctions as set forth in the rule. *See Elliott v. Akey*, No. E2004-01478-COA-R3-CV, 2005 WL 975510, at *4-5 (Tenn. Ct. App. E.S., Apr. 27, 2005); *McGahey v. McGahey*, No. W2003-01051-COA-R3-CV, 2003 WL 22272350, at *5-6 (Tenn. Ct. App. W.S., Oct. 1, 2003). Because the record does not show that Mr.

> Houser complied with the safe harbor requirement of Rule 11.03(1)(a), we reverse the order of sanctions against Mr. Mitrano.

Mitrano, 240 S.W.3d at 862.

We conclude that the Defendant's claim that the trial court erred when it denied his first motion for Rule 11 sanctions is without any merit whatsoever. We reach this conclusion because this issue was not appealed in a timely manner and, even if it was timely appealed, the request for Rule 11 sanctions must fail as a matter of law due to the Defendant's failure to comply with the mandatory requirements of Rule 11.

The Defendant's final issue focuses on the denial of his second motion for Rule 11 sanctions filed almost two years after entry of the final judgment. We agree with the Plaintiffs and the trial court that when this motion was filed, all matters in this lawsuit had long since been resolved. All of the Defendant's motions filed in 2007 lacked any merit because a final judgment had been entered in 2005 and no appeal from that final judgment was taken.

The final issue is the Plaintiffs' claim that the Defendant's appeal is frivolous pursuant to T.C.A. § 27-1-122 (2000). In ***Johnson v. Wilson,*** No. E2005-00523-COA-R3-CV, 2005 WL 2860182 (Tenn. Ct. App. E.S., filed October 31, 2005), *no appl. perm. appeal filed*, we discussed the frivolous appeal statute, stating:

> Tenn. Code Ann. § 27-1-122 (2000) provides as follows:
>
> > When it appears to any reviewing court that the appeal from any court of record was frivolous or taken solely for delay, the court may, either upon motion of a party or of its own motion, award just damages against the appellant, which may include, but need not be limited to, costs, interest on the judgment, and expenses incurred by the appellee as a result of the appeal.
>
> ***Id.*** This statute "must be interpreted and applied strictly so as not to discourage legitimate appeals." ***Davis v. Gulf Ins. Group,*** 546 S.W.2d 583, 586 (Tenn. 1977) (discussing the predecessor of Tenn. Code Ann. § 27-1-122). An appeal is deemed frivolous if it is devoid of merit or if it has no reasonable chance of success. ***Bursack v. Wilson***, 982 S.W.2d 341, 345 (Tenn. Ct. App. 1998); ***Indus. Dev. Bd. v. Hancock***, 901 S.W.2d 382, 385 (Tenn. Ct. App. 1995).

Johnson, 2005 WL 2860182, at *4-5.

The Defendant failed to file a timely appeal from the trial court's final judgment entered on September 29, 2005. In addition to being untimely presented, the issues raised by the Defendant fail

substantively for the various reasons set forth above. In short, the Defendant had no reasonable chance of succeeding on any of the issues. Therefore, we find that this appeal is frivolous.[6]

V.

The judgment of the trial court is affirmed, and this cause is remanded to the trial court for: (1) enforcement of its judgment; (2) a determination as to the damages due pursuant to the provisions of T.C.A. § 27-1-122 (2000); and (3) collection of costs assessed below, all pursuant to applicable law. Costs on appeal are taxed to the appellant, James (Jason) D. Wilson.

CHARLES D. SUSANO, JR., JUDGE

[6] While this appeal was pending, the Defendant filed a motion to consider post-judgment facts. In response, the Plaintiffs claimed that if we granted the Defendant's motion, there were even more post-judgment facts that should be considered. Accordingly, the Plaintiffs also filed a motion to consider post-judgment facts. We deny both motions.